No. 09-805

S... Ct., U.S.
FILED
MAR ... 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

D.D.,

Petitioner,

v.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES ex rel., M.D. and K.D.,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES

PAULA T. DOW
Attorney General of New Jersey
Attorney for State Respondent
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625
(609) 292-4925

ANDREA M. SILKOWITZ
Assistant Attorney General
Counsel of Record
124 Halsey St., 5th Floor
Newark, New Jersey 07102
(973) 648-4730
andrea.silkowitz@dol.lps.state.nj.us

PETER D. ALVINO
Senior Deputy Attorney General
33 Washington St., 9th Floor
Newark, New Jersey 07101
(973) 565-8148

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The New Jersey Division of Youth and Family Services sought to enjoin the petitioner from unsupervised contact with his daughters based on his sexual abuse of his ten-year-old stepdaughter and her twelve-year-old friend. The alleged victims were sixteen and seventeen at the time they testified. In accordance with New Jersey Court Rule 5:12-4(b), the trial judge took the alleged victims' testimony in the presence of counsel, but outside the presence of the petitioner. Unlimited rounds of questions were proposed by counsel, with consultation with their clients between rounds. The question presented by this case is whether this procedure violated the petitioner's rights under the Due Process Clause.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASON FOR DENYING THE PETITION 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Brady v. Maryland, 373 U.S. 83 (1963) 11

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 11

Crawford v. Washington, 541 U.S. 36 (2004) 14

Maryland v. Craig, 497 U.S. 836 (1990) 12

Mathews v. Eldridge, 424 U.S. 319 (1976) 11, 13, 15

New Jersey Division of Youth and Family Services v. D.D., 200 N.J. 473, 983 A.2d 199 (2010) 10

New Jersey Div. of Youth and Family Services v. L.A., 357 N.J. Super. 155, 814 A.2d 656 (App. Div. 2003) 11

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 11

Stanley v. Illinois, 405 U.S. 645 (1972) 12

United States v. Gifford, 892 F.2d 263 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990) 14

United States v. Medjuck, 156 F.3d 916 (9th Cir. 1998), *cert. denied*, 527 U.S. 1006 (1999) 14

United States v. McKeeve, 131 F.3d 1 (1st Cir. 1997) 14

United States v. Salim, 855 F.2d 944 (2d Cir. 1988) 13, 14

United States v. Sturman, 951 F.2d 1466 (6th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992) 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. Const. amend. VI 13

U.S. Const. amend. XIV 13

STATUTES

N.J.S.A. 2A:84A-32.4 12

N.J.S.A. 9:6-8.10a 10

N.J.S.A. 30:4C-27.22 10

N.J.S.A. 30:5B-6.2 10

N.J.S.A. 30:5B-25.3 10

28 U.S.C. § 1257(a) 11

COURT RULES

N.J. Ct. R. 1:36-3 11

N.J. Ct. R. 5:12-4(b) 6

Fed. R. Crim. P. 15 13

STATEMENT OF THE CASE

David D. attempts to portray this matter as one in which allegations of sexual abuse were contrived in order to gain advantage in a matrimonial action. However, on August 21, 2001, years before the marriage between David D. and Ronda C. deteriorated, David D. concedes he had an excellent relationship with his step-daughter, Taylor S. (5T71-9 to 5T72-3).[1] It is undisputed that, on that date at approximately 10 or 11 p.m., David D. was laying on the couch in the finished basement of their home in New Jersey and Taylor went to sleep in a sleeping bag on the floor of that room. (5T20-2 to 9). All parties also agree that, at approximately 12:00 a.m., Taylor got up, went upstairs to the bedroom where her mother was sleeping, and told her that David D., while naked, had rubbed his penis on her face. (2T57-17 to 2T58-11). Taylor's mother, Ms. C., testified that:

> Approximately, I'm going to say twelve o'clock, [Taylor] came upstairs and I thought

---

[1] Pet. App. refers to the appendix filed by the petitioner.

Da refers to the trial exhibits contained in the appendix filed by petitioner David D. in connection with his appeal to the New Jersey Superior Court, Appellate Division.

Transcript cites are to the eight volumes of the six day fact-finding hearing conducted before the Honorable Ann R. Bartlett, J.S.C. March 11 to April 17, 2008. Transcripts of the prior (2005) fact-finding hearing which was held before a different judge and which was reversed by the New Jersey Superior Court, Appellate Division based on lack of jurisdiction (Pet. App. 39a) were available to counsel for use in the 2008 fact-finding hearing.

> I heard her crying in the bathroom. And she came into the room and said to me that something had happened in the basement with Dave. And I immediately jumped up and I said 'what happened?' And she told me he had rubbed his penis on her face . . . She was very upset. She was practically jumping out of her skin. Every time the floor creaked, I guess she thought Dave was coming upstairs, and she was afraid that he would hear her telling me what she had to tell me.

[Pet. App. 88a-89a].

After confronting David D., Ms. C. elected to do nothing about the incident at that time. She testified that she did not report the incident because she was not working, she was five months pregnant with her third child, and she was afraid of what would happen. She testified that David D. begged her to believe him, and that she did not want to believe that her husband was capable of such an act. (2T63-18 to 25). As Ms. C. acknowledged when she stipulated in lieu of fact-finding, her failure to take action to protect her children constituted neglect. (2T64-1 to 10).

Subsequently the marriage between Ms. C. and David D. deteriorated, reportedly, in part, due to David D.'s involvement with pornography. (2T67-2 to 6; 1T80-1 to 1T81-12; 2T62-20 to 2T63-14). David D., who had an upper management position at a pharmaceutical company, was caught three times during his nine-year career there with pornography on his computer. (1T120-12 to 1T121-8; 1T139-17 to 1T140-12;

1T121-12 to 1T123-9). The third time involved the downloading of twenty-two gigabytes of pornographic material – over 400,000 files (1T130-24 to 1T131-1) – and its discovery in January 2003 led to David D.'s termination of employment. Contrary to David D.'s assertion that the material was e-mailed to him, David D. admitted at trial that he had downloaded this material over the course of several months. (Pet. App. 135a). It was later revealed that the pornography he downloaded consisted, at least in part, of child pornography. The files were encrypted and could not be opened, although their titles could be read. Eight hundred and twenty-seven of them were conclusively identified as coming from a commercial child pornography website known as "Lolita's Kingdom." They were matched by file size and group number to the files on the website, which were downloaded and testified to by a special agent from the U.S. Immigration and Customs Enforcement Child Exploitation Unit. (1T38-4 to 1T51-19). The photos of underage girls David D. downloaded were obtained and entered in evidence. In fact, 100% of the files that could be identified consisted of nude pictures of underage females. Most of the other files were titled by number or the name of a female, but many had titles such as "Most Erotic Teens," "Perverse Uncle," "Schoolgirl," "Sunny Teen," "Prized Teens," "Young Blondie Tits," "Young Sisters," "Teen Cambodian Girls Having Fun," "Incest" (Da226-231, 1T129-5 to 9, 1T160-10 to 1T161-4), "Little Girls" (Da278, Id.), "Very Young," "Wicked School Girls" and "Young." (Da278-283, 1T129-5 to 9, 1T160-10 to 1T161-4).

In the fall of 2004, Ms. C. revealed to Taylor that she and David D. were going to get divorced. (2T76-13 to 24; 3T39-16 to 22). Ms. C. apologized to her daughter for her inaction after the August 2001 incident, and asked if anything else had happened. Ms. C. testified that Taylor denied that anything else happened to her but stated that her friend Wanda K. had revealed something like "he took his shirt off and propositioned her." (2T76-13 to 2T77-12). In fact, Wanda K. had revealed to Taylor S. that David D. undressed in front of Wanda K. (3T16-23 to 3T17-1). Ms. C. called Ms. K., Wanda K.'s stepmother, when she learned of the incident; Ms. K. then questioned Wanda K., who described the incident. (2T23-11 to 2T23-23; 2T12-11 to 2T13-9). Ms. K. testified she responded by speaking with professionals and linking Wanda K. with a therapist. (2T13-11 to 15).

The allegations of David D.'s abuse of both Taylor S. and Wanda K. were brought to the attention of the New Jersey Division of Youth and Family Services ("Division") on January 20, 2005, after Ms. C. and Taylor S. had returned to New Jersey from Minnesota where the family had moved in April 2004. Taylor S. disclosed her abuse to her therapist, Pauline Dessertine, on January 18, 2005. (1T73-16 to 1T74-14). After investigation, the Division filed a complaint and obtained an injunction against David D.'s unsupervised contact with his daughters, then ages three and four. Wanda K.'s parents refused to have her interviewed by the Hunterdon County Prosecutor's Office. (2T15-8 to 2T16-3).

Significantly, and contrary to David D's characterization of Taylor's attitude toward him in his various appellate briefs, David D. conceded in his testimony that, up until the August 21, 2001 incident, he had a very good relationship with Taylor S., and that, even after that time, although he contends the relationship deteriorated, his only articulated concerns dealt with arguments over Taylor keeping her room cleaned up and doing her homework. (5T71-9 to 5T71-20).[2] Similarly, David D. testified that he had a good relationship with Wanda K., and did not state any reason why Wanda might accuse him of undressing in front of her. (5T72-1 to 13). Wanda K. initially disclosed the incident with David D. to Taylor long before the marriage between David D. and Ronda C. ended. (3T15-9 to 22; 7T12 to 17; Pet. App. 180a).

Taylor S. and Wanda K. both testified at trial, utilizing a procedure that was explicitly prescribed by

---

[2] Mr. D.'s contention that ten-year-old Taylor dreamed that he leaned over her and touched her face with his penis is unsupported in the record. While he claims that he and his then wife "discussed" whether Taylor was dreaming, the record reflects only an insistence by David D. that Taylor had dreamed the event. (2T92-11 to 15). The dreams Taylor did have, which Mr. D. characterizes as "disturbing" and "recurring," were never described as disturbing or upsetting in any way, were not sexual, and occurred when Taylor was three and four years old. (3T38-1 to 10).

the New Jersey Superior Court, Appellate Division in its January 17, 2008 opinion:[3]

> When the *de novo* fact-finding hearing is conducted, any proofs adduced from [Taylor S.], who is now the age of sixteen, shall be taken either in open court or, if the judge elects in his discretion to have her re-interviewed in chambers, *see* R.5:12-4(b), all counsel shall have the right to either be present or to observe the child's responses contemporaneously through closed circuit television or a comparable video link, in accordance with N.J.S.A. 2A:84A-32.4. Consistent with our prior opinion, all counsel shall be afforded the opportunity to submit to the court additional questions to pose to [Taylor S.] after the initial portion of such an interview.

[Pet. App. 44a-45a].

The trial court decided to employ these procedures. All counsel were present when Taylor S. and Wanda K. testified, and rounds of follow-up questions (subsequent to consultation with their respective

---

[3] The case had previously been tried in the Fall of 2005, at which time a finding of abuse had been made. (Pet. App. 7a). That finding was reversed by the Superior Court of New Jersey, Appellate Division, which found that Minnesota, rather than New Jersey, had jurisdiction. (Pet. App. 39a). Minnesota subsequently determined it was an improper and inconvenient forum, as the children resided in New Jersey and the alleged abuse occurred in New Jersey. (Pet. App. 40a).

clients) were permitted until no counsel proposed additional questions. *See*, 1T12-1 to 1T15-1; 2T9-17 to 25; 3T20-5 to 3T32-7; 3T40-24 to 3T41-23. After two rounds of questions of Taylor, counsel for David D., after consultation with his client, elected to end questioning after moving transcripts of Taylor's January 2005 statements to the Hunterdon County Prosecutor and of her prior testimony in the September 2005 fact-finding hearing into evidence. (Pet. App. 129a). He thus concluded as a matter of trial strategy that he would prefer to argue the alleged discrepancies in Taylor's recorded statements than to have additional questions asked. (3T40-24 to 3T41-6). Counsel for David D. did not, at trial, in the Appellate Division nor in his submission to the New Jersey Supreme Court, identify a single additional question that he would have asked either of the minor witnesses in the event David D. had been present in the courtroom during cross-examination.

David D.'s counsel had the opportunity to have the court ask whatever non-objectionable questions he proposed, and to consult with David D. as many times as necessary in formulating those questions. He had the opportunity to review records of multiple prior interviews and testimony given by Taylor S. and, in fact, moved two transcripts into evidence, electing to comment on their alleged discrepancies rather than to have questions asked about them. (Pet. App. 129a). As to Wanda K., after counsel for David D. initially requested that she take the witness stand in the normal course, the court asked why Wanda K.

should not be questioned in the same way as Taylor S. Counsel for David D. responded, "That's going to be the next witness. Judge, should we just take our positions in the back of the courtroom again?" (Pet. App. 141a). The Appellate Division interpreted this as counsel for David D. suggesting that the same procedure be followed. (Pet. App. 22a).

The trial court explicitly found David D.'s testimony to be incredible, citing his demeanor, implausibility of various explanations on the stand, unwillingness to concede even documented facts, and demonstrated false statements he made to court-ordered evaluators, his employer, and his family. (7T13-8 to 7T19-21). In contrast, the trial court found both Taylor S. and Wanda K. believable. The judge characterized Taylor S. as giving direct answers and maintaining good eye contact. The court characterized the inconsistencies in statements given three, and then six, years after the event (which occurred when Taylor was ten) as minor, and in fact there were very few inconsistencies either with Taylor's original statements to authorities or with those she reportedly gave to her mother and stepfather on August 21, 2001. (Pet. App. 88a; 102a-106a; 164a-170a; 172a-178a).

Prior to the 2008 remand hearing in this matter, Wanda K. was contacted and provided a written statement of the incident with David D. (Da312, 2T17-7 to 23, 2T18-8 to 2T21-22). The statement described, and Wanda K. later testified, how she had gone to the D. home at David D.'s request to babysit

K.D. and M.D. because David D. had an appointment. (Pet. App. 146a). She did not remember the date, except that it was a weekday in the summer.[4] (Da312, *supra*). David D. took a shower and, clad only in a towel, returned to the room where then twelve-year-old Wanda was playing a video game waiting for the girls to finish their nap. (Id.; Pet. App. 146a). He then removed the towel and called out to Wanda K. to get her attention. (Da312, *supra*; Pet. App. 146a). Wanda K. told David D. she was uncomfortable and left; David D. told her to keep the incident "our secret." (Da312, *supra*; Pet. App. 147a).

As to Wanda K., the trial court found that

> [Wanda K.] was a very poised witness. She had good eye contact with the Court, forthright body language, forthright demeanor, she was sure of her answers. Her testimony was consistent.

[8T30-5 to 8T31-4].

In making an analysis of the admissibility of "other crimes evidence," the trial court found by clear and convincing evidence that the incident with then twelve-year-old Wanda K. happened and that it constituted evidence of David D.'s sexual interest in

---

[4] Wanda K.'s stepmother testified that Wanda frequently babysat K.D. and M.D. the summer between Wanda's sixth and seventh grades, which would have been 2003. (2T11-13 to 21; 2T15-1 to 2; 7T5-8 to 18).

underage girls. (8T27-18 to 24; 8T30-20 to 8T31-4; 8T33-19 to 25).

The trial court found that David D. had sexually abused ten-year-old Taylor S. by touching her face with his penis, that he had exposed himself to twelve-year-old Wanda K., and that his demonstrated sexualized interest in underage girls supported a finding that David D. posed an unacceptable risk of sexual abuse to then seven-year-old K.D. and eight-year-old M.D. The court thus ordered that David D.'s contact with his daughters be supervised. (Pet. App. 201a).[5]

The Superior Court of New Jersey, Appellate Division affirmed the trial court, holding that the procedure employed to take the testimony of the minor witnesses was a proper exercise of discretion by the trial judge, and that the evidence supported a finding of "imminent and substantial risk" to K.D. and M.D. (Pet. App. 24a). The Supreme Court of New Jersey denied certification. *New Jersey Division of Youth and Family Services v. D.D.*, 200 N.J. 473, 983 A.2d 199 (2010). This matter remains open in the Superior Court of New Jersey, Family Part, Hunterdon County,

---

[5] David D.'s claim that he has been "branded" as a child abuser means only that he is included in a confidential registry which the New Jersey Division of Youth and Family Services consults when additional referrals are received about a family, and which bars employment (post-hearing) at day care centers, residential treatment centers for children, and adoption agencies. N.J.S.A. 9:6-8.10a, N.J.S.A. 30:5B-6.2, N.J.S.A. 30:4C-27.22, N.J.S.A. 30:5B-25.3. Petitioner has never worked in such a field or indicated any desire to do so.

and orders for David D. to engage in treatment and for restrictions on visitation with his daughters remain in place.

REASONS FOR DENYING THE PETITION

Review of the decision in this matter is unwarranted in the first instance because the decision is an unpublished affirmance of an interlocutory order,[6] by a mid-level state appeals court, and would have no precedential value. *See*, N.J. Ct. R. 1:36-3.

Second, the procedure the petitioner seeks to mandate, in which the flexible procedure heretofore dictated by *Mathews v. Eldridge*, 424 U.S. 319 (1976), is discarded in favor of a directive ostensibly calculated to address the procedures to be employed in all civil child protection cases, no matter what the circumstances, age or emotional makeup of the child,

[6] An order finding abuse and neglect is interlocutory under New Jersey law, and does not become final until all issues are disposed of. *New Jersey Div. of Youth and Family Services v. L.A.*, 357 N.J. Super. 155, 164-66, 814 A.2d 656, 661-62 (App. Div. 2003). It appears, however, that since the procedure utilized to make a finding of abuse in this matter is the basis of the petition, and that this question is independent of additional rulings regarding mandated treatment, visitation, and/or custody that may be made, that the order under review would properly be deemed "final" for purposes of 28 U.S.C. § 1257(a). *See*, *Brady v. Maryland*, 373 U.S. 83, 85 (1963), *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971), *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

or history of the case, is not required by due process and does not properly take into account either the myriad and complicated factual scenarios presented by civil child abuse and neglect cases or the need to protect the safety and well being of the children who are the subjects of these actions. Ironically, however, one of the mandates proposed by petitioner was, in large measure, actually employed in this matter. Petitioner urges that the "criteria set forth in the New Jersey closed circuit TV statutes" (N.J.S.A. 2A:84A-32.4) be employed as a constitutional imperative. The New Jersey Superior Court, Appellate Division, concluded that the methodology employed by the trial court in this matter constituted the "functional equivalent" of the statutory procedure the petitioner seeks to mandate. (Pet. App. 36a).

States, and state court judges, are best suited to balance the rights of defendants and the needs of the subject children in civil child abuse and neglect cases within the confines of the Due Process Clause. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation and firmly establishes that what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972). *See also, Maryland v. Craig*, 497 U.S. 836, 855 (1990). In this case petitioner, while correctly identifying his own

fundamental liberty interest in the companionship and custody of his children, ignores the countervailing interest of both the State and those children in their safety and well being. That consideration, not present in the numerous criminal cases cited by the petitioner, calls for more flexible procedures. The numerous cases cited by petitioner as examples of approaches utilized by various state courts addressing disparate fact patterns demonstrate not only the efficacy and vitality of *Mathews v. Eldridge*, but the necessity of flexibility given the wide variety of circumstances courts charged with protecting children encounter.

Nor is there any merit to the assertion that the method employed by the trial court, wherein the judge asked rounds of questions proposed by the attorneys, means that the child was not cross examined, and that the absence of the defendant from the courtroom effects a denial of due process. The issue of questioning of witnesses by a judge based on questions proposed by counsel has arisen in the context of depositions conducted in accordance with Fed. R. Crim. P. 15. Each circuit court of appeals that has addressed the question has determined that, where questioning of a witness is done by a foreign judge based on questions supplied by the attorneys, due process and the Confrontation Clause are satisfied and the record of that deposition is not inadmissible as evidence due to a Sixth Amendment or Due Process Clause violation. *United States v. Salim*, 855 F.2d 944, 954-55 (2d Cir. 1988); *United States v.*

Sturman, 951 F.2d 1466, 1481 (6th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992). While the vitality of these cases as they relate to criminal matters may be in question after the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), their analysis would still be applicable to this civil case. Similarly, each circuit that has addressed the issue concluded that the absence of a defendant from the taking of a deposition in a criminal case does not necessarily make that deposition inadmissible at trial. *See*, *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998), *cert. denied*, 527 U.S. 1006 (1999); *United States v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997); *United States v. Gifford*, 892 F.2d 263, 265 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Salim*, *supra*, 855 F.2d at 952.

Petitioner's complaint as to the adequacy of the trial judge's examination is, in reality, a second guessing of his own trial strategy. He had the option of continuing after a second round of questioning of both Taylor S. and Wanda K. but declined in both instances after consultation with his client. Nor did he take issue at trial with the substance or phrasing of anything asked by the judge. Apparently, he felt he could best make his point by identifying discrepancies in Taylor S.'s statements, which he pressed before the trial court and on appeal. The trial court concluded that, despite minor inconsistencies, Taylor S. was consistent, forthright and credible, while David D. was "frankly incredible," and the Appellate Division

deferred to those findings. (8T30-5 to 8T31-4, Pet. App. 23a).

The method by which evidence is presented in a civil child protection case is a matter particularly appropriate for resolution in the state courts within the boundaries set by *Mathews v. Eldridge*. Although a significant finding has been made against petitioner, due process has been afforded and it has not resulted in termination of his parental rights. Moreover, custody orders are always open to review by the trial court.

As the procedures employed by the trial court were fully protective of David D.'s due process rights as articulated in *Mathews* and demonstrated in the record below, review by this Court is not warranted. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons stated, the petition of David D. for a writ of certiorari should be denied.

Respectfully submitted,

PAULA T. DOW
Attorney General of New Jersey
Attorney for State Respondent
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625
(609) 292-4925

ANDREA M. SILKOWITZ
Assistant Attorney General
Counsel of Record
124 Halsey St., 5th Floor
Newark, New Jersey 07102
(973) 648-4730
andrea.silkowitz@dol.lps.state.nj.us

PETER D. ALVINO
Senior Deputy Attorney General
33 Washington St., 9th Floor
Newark, New Jersey 07101
(973) 565-8148

March 8, 2010